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## Digital Realty, Legislative History, and Textualism After Scalia

Michael Francus

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# ***Digital Realty, Legislative History, and Textualism After Scalia***

Michael Francus\*

## *Abstract*

*There is a shift afoot in textualism. The New Textualism of Justice Scalia is evolving in response to a new wave of criticism. That criticism presses on the tension between Justice Scalia's commitment to faithful agency (effecting the legislature's will) and his rejection of legislative history in the name of public meaning (ignoring the legislature's will). And it has caused some textualists to shift away from faithful agency, even to the point of abandoning it as textualism's grounding principle.*

*But this shift has gone unnoticed. It has yet to be identified or described, let alone defended, even as academic and judicial textualists continue to drift away from New Textualism to a newer textualism.*

*Digital Realty v. Somers brought this newer textualism to the fore in a pair of concurrences that dueled over legislative history. That duel reopened the debate long silenced during Justice Scalia's tenure. And it suggested two shifts. First, Justice Alito signed on to the textualists' rejection of legislative history, signifying a shift in his jurisprudence. Second, and presumably the cause of the first, Justice Thomas returned to the argument that intent, and thus the legislative history in which it is found, is illegitimate in principle—not just impractical. That line of argument signals a rejection of faithful agency and a shift from New Textualism's embrace of faithful agency to a textualism that instead grounds itself in democratic interpretation.*

*This Article teases out what Digital Realty portends. It identifies the shift toward a New New Textualism. And it describes that textualism's latest development, which rejects faithful agency and replaces it with democratic interpretation. Last, this Article sketches a defense of the position that this New New Textualism, in developed form, stakes out.*

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## I. INTRODUCTION

*Digital Realty Trust, Inc. v. Somers*<sup>1</sup> was supposed to be a sleepy case. The question posed to the Court was simple: Does a statute that defines a whistleblower as someone who provides “information relating to a violation of the securities laws to the [Securities and Exchange] Commission” extend protection to those who report to company supervisors rather than the Commission?<sup>2</sup>

A unanimous Court held that Mr. Somers did not qualify as a whistleblower because he had reported only internally.<sup>3</sup> It reasoned that the “explicit definition” resolved the case.<sup>4</sup> It then shored up that reasoning by pointing to the statute’s purpose and gleaned some of Congress’s intent from the Senate Committee Report.<sup>5</sup>

So far, so soporific.<sup>6</sup> But in a pair of dueling concurrences, Justices Sotomayor and Thomas took the opportunity to reopen the debate over the legitimacy of legislative history.<sup>7</sup> The Sotomayor concurrence argued that legislative history could “fortify our understanding” of the whistleblower provision and thus defended the majority’s use of the Senate Committee Report.<sup>8</sup> The Thomas concurrence rejected that idea, deeming legislative history illegitimate, resting its analysis on the text alone, and concurring with the majority only to that extent.<sup>9</sup>

The dueling concurrences are noteworthy, not only because they represent the reemergence of legislative history from a Scalia-sized hibernation, but also because they reveal two developments in textualism.<sup>10</sup> First, Justice

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1. 138 S. Ct. 767 (2018). Justice Ginsburg’s majority opinion keeps with her jurisprudence as a whole, which has never adopted the mantle of textualism. *See id.*

2. *Id.* at 772 (quoting 15 U.S.C. § 78u-6(a)(6)).

3. *Id.*

4. *Id.* at 782–83.

5. *Id.* at 780.

6. *See* Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN L. REV. 673, 689 (2018) (discussing the limited duty bestowed on the majority by stating, “[i]ndeed, to the Court, its only ‘charge’ in the case was to determine the meaning of whistleblower in subsection (h)”) (internal quotations omitted).

7. *Compare Digital Realty*, 138 S. Ct. at 782 (Sotomayor, J., concurring) (supporting use of legislative history in judicial decision-making), *with id.* at 783 (Thomas, J., concurring) (opposing Sotomayor’s view over the usefulness of legislative history).

8. *Id.* at 783 (Sotomayor, J., concurring).

9. *Id.* at 783–84 (Thomas, J., concurring).

10. *See id.* at 782–84 (detailing the concurrences in which Justices Sotomayor and Thomas debate the legitimacy of legislative history); *see* Linda Greenhouse, *Justice Scalia’s Fading Legacy*, N.Y.

Alito joined Justices Thomas and Gorsuch, displaying a shift in his stance on legislative history.<sup>11</sup>

Second, and presumably the cause of Justice Alito's conversion, the Thomas concurrence signaled a conceptual shift for textualists. The concurrence departed from the mainstream "New Textualism"<sup>12</sup> of Justice Scalia. And it moved toward a textualism that responds to the conceptual tension of Justice Scalia's thought:<sup>13</sup> Justice Scalia grounded textualism in the principle of faithful agency—the idea that interpretation ought to effect the will<sup>14</sup> of Congress—but he then panned intent and shunned tools like legislative history that might offer insight into Congress's will.<sup>15</sup>

The New New Textualism addresses this tension.<sup>16</sup> But rather than follow the mainstream textualist response, which seeks to square faithful agency with a rejection of intent and legislative history, the New New Textualism rejects

TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy.html> (noting that Scalia's colleagues now "feel free to invoke legislative history . . . without tip-toeing over the hot coals of his scorn"); see also James Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS U. L.J. 975, 993 (2013) (characterizing the majority of the Court's approach to legislative history as evidence that can "more or less" carry weight).

11. *Id.* at 783 (Thomas, J., concurring). A series of recent cases confirm Alito's shift. See, e.g., *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1756 (2018); *Marinello v. United States*, 138 S. Ct. 1101, 1115 n.1 (2018) (Thomas, J., concurring).

12. William Eskridge coined this term in his landmark article of the same name, which explored the early jurisprudence of Justice Scalia. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

13. See *id.* at 655 (highlighting the apparent paradox in Scalia's viewpoints).

14. "Will" here is intentionally ambiguous, and captures the baseline agreement of faithful agents—that the courts' task is to effect *something* that Congress wished. Different theories of faithful agency argue for different somethings. Gideon Rosen, *Textualism, Intentionalism, and the Law of the Contract*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN LAW 132–33 (Andrei Marmor & Scott Soames eds., 2013). Some look to Congress's intent—lexical, semantic, communicative, practical, or legal intentions. *Id.* Among those, some look for subjective intent and others objective. *Id.* Other faithful agents seek to effect Congress's purpose, imaginatively reconstructed for a particular case or hypothesized in general. *Id.* But all subscribers to faithful agency agree that a court is in some form obligated to carry out *something Congress willed* as manifested in its text, intent, or purpose. *Id.* So this Article uses the term to "will" broadly to capture all theories of faithful agency, recognizing that the term is by nature imprecise given the differences among faithful agents. *Id.* Courts, unsurprisingly, have seldom stuck to a specific form of intentionalism or purposivism, let alone expounded on such a particular method. *Id.*

15. See Eskridge, *supra* note 12 at 650 ("Justice Scalia has aggressively criticized the traditional approach and has argued for disregard of legislative history in the great majority of cases.").

16. For an early analysis of some of the tensions in Justice Scalia's early jurisprudence, see David Schultz, *Legislative Process and Intent in Justice Scalia's Interpretive Method*, 25 AKRON L. REV. 595, 598–610 (1992), <https://www.uakron.edu/dotAsset/679498ef-8227-4790-982f-7ab5a91e2ff2.pdf> (noting especially Justice Scalia's inconsistency on legislative intent).

faithful agency.<sup>17</sup> In its place, this textualism grounds itself in the principle of democratic interpretation—looking at public meaning, not intent—and viewing law from the perspective of the governed, not the governing.<sup>18</sup>

This New New Textualism thus militates for a textualism free of faithful agency and committed to effecting public meaning instead of any form of congressional will.<sup>19</sup> So it shares much with its forbear, like prioritizing text and rejecting almost all legislative history. But the New New Textualism works a conceptual reorientation of textualism and offers a more sound grounding for textualism.<sup>20</sup> That reorientation, in turn, bears implications for every tool of statutory interpretation, from the plain meaning rule to the absurdity canon.<sup>21</sup>

This Article explores that shift. It teases out the arguments, textualist and nontextualist, motivating the New New Textualism. It also shows how the Thomas concurrence follows the logical trajectory of that New New Textualism.<sup>22</sup> It then describes the position in which that trajectory culminates. Finally, this Article sketches a defense of that position, showing that this New New Textualism follows from the philosophy of language and that, insofar as jurists are textualists, they ought to subscribe to the New New Textualism.

## II. A BRIEF INTELLECTUAL HISTORY OF LEGISLATIVE HISTORY

Starting in the mid-twentieth century, statutory interpretation has been a back-and-forth between textualists and nontextualists.<sup>23</sup> That dialogue began

17. See *id.*; see also discussion *infra* Part IV (discussing how New New Textualism is rejecting faithful agency as a mechanism of interpretation by noting that public meaning and faithful agency are incompatible and public meaning is a preferable tool).

18. See *infra* note 139 (collecting textualist sources on democratic interpretation).

19. Textualists are not the only ones to have argued against faithful agency. Indeed, their opposites, those who promote judicial pragmatism, have likewise questioned the norm. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 321 n.9 (“Conceptualizing the court’s role in statutory interpretation as a protector of public values goes beyond legal process theory to the extent it encourages courts to engage in creating norms.”).

20. See Eskridge, *supra* note 12, at 683 (noting the unsound principles in traditional textualism—namely that “it seems unfriendly to democratically achieved legislation and threatens to undo much of Congress’ statutory work”).

21. See *infra* notes 228–31 and accompanying text (explaining the implications of the New New Textualism for substantive canons, absurdity doctrine, and scrivener’s error).

22. See Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 144–45 (2009) (arguing that textualism is “working itself pure” by jettisoning tools that conflict with its core commitments) [hereinafter Siegel, *Inexorable Radicalization*].

23. For the sake of simplicity, this Article will lump the opposition into the term “nontextualist,”

with “faithful agency,” the grounding principle—embraced by both sides—that statutory interpretation ought to effect the will of Congress.<sup>24</sup> The thrusts and parries within the dialogue, then, cut at what conception of “will”—intent or purpose and what kind of intent or purpose—ought to control and which tools of interpretation should, and should not, be used to effect that will.

This Part describes the series of arguments that form the backdrop against which *Digital Realty* operates. In broad strokes, this Part begins with pre-Scalia intentionalism,<sup>25</sup> which held that faithful agents must effect congressional intent and pushed for a methodology that prized legislative history (and the intent it revealed), even over text.<sup>26</sup> Then, Justice Scalia introduced the New Textualism, which held that faithful agency was best adhered to by looking to public meaning and rejecting legislative history.<sup>27</sup> To do so, he offered a host of arguments against the intentionalist view of intent as law and against

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as the distinctions among them do not matter for this Article, and often, nontextualists blur the line—both in labeling and in judging. Compare John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 117–18 (2001) (identifying the development of legal process purposivism after classical intentionalism), with John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–20 (2005) [hereinafter Manning, *Legislative Intent*] (noting that “classical intentionalism” reigned in the late-twentieth century before textualism came to the fore). The key distinction for this Article is between those who find public meaning controlling (textualists) and those who find intent or purpose (even if coupled with public meaning) controlling. As a historical matter, the principal opposition to textualism in the twentieth century was intentionalism, while, recently, the lead opposition has come from purposivism. See *id.*; compare Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 351–52 (2005) (defining and contrasting textualism and intentionalism), with ROBERT A. KATZMANN, *JUDGING STATUTES* 31, 47–49 (2014) (same).

24. See John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 71, 95–96 (2006) (noting that “[t]raditionally, the Court’s ‘purposivism’ rested on the following intuitions: In our constitutional system, federal courts act as faithful agents of Congress; accordingly, they must ascertain and enforce Congress’s commands as accurately as possible[.]” but also recognizing that textualists also “[start] from the longstanding Constitutional premise that federal judges must act as faithful agents of Congress”); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (noting that faithful agency is the “most prominent conception of the role of courts in statutory construction”).

25. See Manning, *supra* note 24, at 76–77. The Court during that era did not specify what form of intentionalism it subscribed to, so the precise intentions that mattered (for example, semantic or communicative) were never spelled out. See *id.* (discussing textualist’s view on semantics). But the imprecision did not matter much, as the textualist critique applied to all forms of intent. *Id.*

26. See *infra* Section II.A; see also Eskridge, *supra* note 12, at 626–27 (stating that “[t]he Court looked to the legislative history ‘to determine only whether there is “clearly expressed legislative intention” contrary to that language, which would require up to question the strong presumption that Congress expresses its intent through the language it chooses”’ (internal citations omitted)).

27. See Eskridge, *supra* note 12, at 650–56 (outlining Justice Scalia’s Critique of the Traditional Approach and his proposed alternative).

the use of legislative history.<sup>28</sup>

In response, a wave of nontextualists in the academy and the judiciary made the case for a different nontextualist methodology. Still grounded in faithful agency, that methodology sought to effect intent-as-cashed-out-in-text and thus inquired into legislative history for its value in informing how a text captured that intent.<sup>29</sup> To this, the nontextualists added a criticism of textualists by pressing on the tension in textualism between proclaiming faithfulness to the will of Congress but then rejecting all indicia of congressional intent, purpose, or will of any kind.

The mainstream of New Textualists answered that criticism with explanations of how rejecting intent (and legislative history) was more faithful to Congress after all. And there the debate simmered for some time. But recently, an undercurrent in textualism has taken a different tack, recognizing the tension pressed by nontextualists, accepting the incompatibility of faithful agency and public meaning, and pushing for a rejection of faithful agency. It is at this fork of textualism that the *Digital Realty* duel finds itself.

#### A. Before Scalia

Before Justice Scalia took the bench, intentionalism dominated statutory interpretation.<sup>30</sup> Under this view, faithful-agent judges sought to effect the intent of Congress.<sup>31</sup> They therefore prioritized that intent over text, purpose,

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28. See *id.*

29. See *infra* Section II.C; see also, Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 538, 587 (2016) (using “cashing out” in context of legislative intent).

30. See Eskridge, *supra* note 12, at 667 (noting that intentionalism collapsed in the 1980s). Conflating intentionalism and purposivism is not uncommon, even among scholars. Manning, *Legislative Intent*, *supra* note 23, at 419. This may be because the two are not all that distinct in today’s practice, or because practitioners today routinely conflate the two. See, e.g., KATZMANN, *supra* note 23, at 31. But for purposes of conceptual clarity in this intellectual history, it is worth noting the distinction and the transition from intentionalism as the dominant mode of nontextualism to purposivism—specifically legal process purposivism—as the dominant mode of nontextualism. *Id.* As will become apparent below, the same arguments posed here by New New Textualists present the same challenges to all forms of nontextualists. See discussion *infra* Section II.A.

31. See Manning, *Legislative Intent*, *supra* note 12, at 419 (stating that “[f]or much of our history, the Supreme Court has unflinchingly proclaimed that legislative ‘intent’ is the touchstone of federal statutory interpretation. The rationale is familiar: In a constitutional system predicated upon legislative supremacy (within constitutional boundaries), judges—as Congress’s faithful agents—must try to ascertain as accurately as possible what Congress meant by the words it used. On this premise, federal judges long assumed that when a statute was vague or ambiguous, interpreters should seek clarification, if possible, in the bill’s internal *legislative history*.” (emphasis added)).



policy, and other desiderata that interpretation could seek to effect.<sup>32</sup> Legislative history, in turn, played a starring role in discerning that intent.<sup>33</sup>

To take the classic example, in *Citizens to Preserve Overton Park v. Volpe*,<sup>34</sup> the Court examined legislative history first and only resorted to examining text after finding the legislative history “ambiguous.”<sup>35</sup> From an intentionalist view, that made sense: Intentionalists started with faithful agency and gave it flesh by adopting a methodology that sought Congress’s intent. So elevating legislative history (a tool to discover intent) over text (a less helpful indicator of intent),<sup>36</sup> followed with logical force.

### B. *The Age of Scalia*

When Justice Scalia ascended to the Court, he too shared faithful agency as his grounding principle.<sup>37</sup> In his view, though, faithful agency demanded a different methodology: textualism.<sup>38</sup> And within his textualism, legislative history was not an acceptable tool.<sup>39</sup> He thus parted ways with intentionalists, both on methodology and on the use of legislative history.<sup>40</sup>

That departure did not come all at once.<sup>41</sup> Justice Scalia’s textualism began as a strong version of the plain meaning rule, the idea that, if the text is clear, then judges should look no further.<sup>42</sup> Over time, though, his textualism developed into the fully fledged “New Textualism,” in which only the text disclosed congressional will, and only the text mattered—no matter the muddle.<sup>43</sup> That New Textualism is the mainstream of today’s textualism, known

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32. *See id.*

33. *See id.*

34. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977).

35. *Id.* at 412 n.29.

36. *See infra* note 104.

37. *See* Eskridge, *supra* note 12, at 624.

38. *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017) (“Justice [ ] Scalia reshaped statutory interpretation. . . . He made textualism one of his signature issues and waged a sustained, decades-long campaign to promote it.”).

39. *See id.*

40. *See id.* (“Notwithstanding all the time and energy [Justice Scalia] devoted to promoting textualism, [he] never persuaded the Supreme Court to abandon reliance on legislative history. . . . Most of all, the Court never adopted Justice Scalia’s fundamental textualist axiom: ‘The text is the law.’”).

41. *See id.*

42. *See* Eskridge, *supra* note 12, at 685–86.

43. *See id.* at 623 (“The [N]ew [T]extualism posits that once the Court has ascertained a statute’s

for its insistence on the primacy of text; use of dictionaries and canons; and rejection of legislative history.<sup>44</sup>

To bring this New Textualist thought to bear, Justice Scalia took to the Court an arsenal of now-familiar arguments against intentionalism. Famously, he argued that intent simply is not law.<sup>45</sup> More influential yet were his arguments against legislative history, which doubled as arguments against intentionalism by critiquing its foremost tool of interpretation. His allies on the bench and in the academy—like Judge Frank Easterbrook and Dean John Manning—then augmented those arguments with many of their own.<sup>46</sup>

Consider a sampling of Justice Scalia's arguments. First, that legislative history is not voted on.<sup>47</sup> Second, that legislative intent is an oxymoron because collective intent does not exist.<sup>48</sup> Third, that legislative history does not provide notice, as citizens cannot guess the intent of the legislator.<sup>49</sup> These arguments reject legislative history as illegitimate in principle, counseling against ever using it—no matter the value it might add.<sup>50</sup>

Another set of textualist arguments rejects legislative history based on

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plain meaning, consideration of legislative history becomes irrelevant.”).

44. *Id.* at 621, 623–24, n.11; see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 31 (1997) (“I object to the use of legislative history on principle, since I reject the intent of the legislature as the proper criterion of the law.”).

45. This dovetails with Justice Scalia's formalist persuasion, which hammered on the point that bicameralism and presentment make law, and the law that they make is the thing that is voted on and signed: the text. See SCALIA, *supra* note 44, at 31.

46. See, e.g., Eskridge, *supra* note 12, at 643 (explaining that “Frank Easterbrook has . . . assert[ed] that judges’ reliance on legislative history to discern legislative intent amounts to nothing more than ‘wild guesses’”); Manning, *supra* note 24.

47. See *Carr v. United States*, 560 U.S. 438, 458 (2010) (Scalia, J., concurring in part) (“[O]nly the text Congress voted on . . . is an authoritative indicator of the law.”); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“We are governed by laws, not by the intentions of legislators.”); *Begier v. IRS*, 496 U.S. 53, 68 (1990) (Scalia, J., concurring) (“Congress conveys directions in the Statutes at Large, not the Congressional record . . .”).

48. See *Bank One Chi., N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (“[L]egislative history that does represent the intent of the whole Congress is fanciful.”); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983). This argument was made by Max Radin well before the New Textualists arrived on the scene, but they adopted it as well. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–71, 875–77 (1930).

49. See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) (“Citizens arrange their affairs not on the basis of their legislators’ unexpressed intent, but on the basis of the law as it is written and promulgated.”); Nelson, *supra* note 23, at 366–67.

50. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy.”); see also Siegel, *Inexorable Radicalization*, *supra* note 22, at 120 (“Textualism’s fundamental philosophy—its prime directive—is that ‘[t]he text is the law, and it is the text that must be observed.’”).

practical concerns.<sup>51</sup> For instance, a fourth argument holds that legislative history decreases in quality the more courts rely on it.<sup>52</sup> A fifth argument contends that judges who peel back the curtain of legislative history find only themselves and their own views, not something intended by the legislature.<sup>53</sup> A sixth argument contends that few legislators read, let alone understand, the committee reports and other documents that constitute legislative history.<sup>54</sup> A seventh asserts that legislative history is unreliable.<sup>55</sup> And an eighth alleges judges are not adept at rooting through legislative history and finding intent.<sup>56</sup>

To this hodgepodge, textualist allies added a host of policy arguments.<sup>57</sup> For instance, Judge Easterbrook argued that excising legislative history offers a simple, more efficient way of adjudicating disputes.<sup>58</sup> In the same vein, Judge Easterbrook argued that rejecting legislative history increases predictability.<sup>59</sup> Of a piece with these, Manning emphasized that textualists believe legislation is often a compromise, and thus, the bargained-for text must control if judges are not to upset the balance struck by Congress.<sup>60</sup>

These arguments reflect distaste for legislative history more than they reflect a coherent theory of statutory interpretation or a theory of how faithful agency prohibits—or requires or encourages—a specific methodology or specific tools of interpretation.<sup>61</sup> Some of these arguments are rooted in principle,

51. See Manning, *supra* note 24, at 91.

52. See SCALIA, *supra* note 44, at 108.

53. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (“[L]egislative history . . . lends itself to a kind of ventriloquism.”); SCALIA, *supra* note 44, at 93; Easterbrook, *supra* note 48, at 551 (“[E]ven the best intentioned will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good.”).

54. *Bank One Chi. N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) (“[I]t is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the . . . Act . . . were aware of the drafting evolution . . . .”); SCALIA, *supra* note 44, at 106.

55. *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (noting that “committee reports . . . are increasingly unreliable evidence” of what members of Congress thought).

56. See Nelson, *supra* note 23, at 363–64; Easterbrook, *supra* note 48, at 550–51.

57. See Nelson, *supra* note 23, at 354 (discussing textualists objection to using legislative history).

58. See Easterbrook, *supra* note 48, at 552; Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) [hereinafter Easterbrook, *Original Intent*]. See also *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (noting that legislative history is “more likely to confuse than to clarify”).

59. See Easterbrook, *Original Intent*, *supra* note 58, at 65; see also *Conroy*, 507 U.S. at 519 (Scalia, J., concurring) (arguing that legislative history “undermines the clarity of law”).

60. Manning, *supra* note 24, at 74; see also Easterbrook, *Original Intent*, *supra* note 58, at 63.

61. See Nelson, *supra* note 23, at 362. As Caleb Nelson notes, textualist have taken the “kitchen sink” approach, with some arguments more sound than others. *Id.*

counseling for a rejection of legislative history altogether.<sup>62</sup> Some are practical, suggesting that the judicial game is not worth the proverbial candle. Some are policy-driven, arguing that better outcomes result when judges reject legislative history, even if legislative history is legitimate and can avoid the host of practical pitfalls.<sup>63</sup>

These arguments felled intentionalism.<sup>64</sup> They defeated the methodology that viewed intent as law and that, in turn, sought that intent in legislative history instead of text.<sup>65</sup> But Justice Scalia's arguments against intentionalism and legislative history did not explain why jurists ought to be textualists rather than not-intentionalists. He did not elsewhere explain how faithful agency demanded textualism or demanded a rejection of intent and legislative history.<sup>66</sup>

Indeed, at times Justice Scalia spoke of looking for "objectified intent" (as discerned in text), but he left unclear how that text or objectified intent related to congressional will and faithful agency.<sup>67</sup> At times, Justice Scalia left open the question of whose perspective he interpreted from—legislator, lawyer, or layman—and hence whose will, and what kind of will, he looked for.<sup>68</sup> At times he critiqued "purpose," but he also noted that judges could consult "purpose" to help distinguish among permissible readings of the text.<sup>69</sup> At times, he even countenanced legislative history.<sup>70</sup>

To sum up, then, Justice Scalia did yeoman's work to develop

62. See Siegel, *Inexorable Radicalization*, *supra* note 22, at 120; see also *Conroy*, 507 U.S. at 519 ("We are governed by laws, not by the intentions of legislators.").

63. See *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (using arguments from illegitimacy, unreliability, and the difficulty of parsing legislative history all the while suggesting that courts should seek to "effectuat[e] . . . congressional intent").

64. See Eskridge, *supra* note 12, at 623–24, 667 (discussing that once courts started adopting "a statute's plain meaning, considerations of legislative history becomes irrelevant").

65. See *id.* at 677.

66. See Brudney, *supra* note 10, at 976 ("In justifying their role as faithful agents, ordinary meaning advocates typically do *not* invoke congressional-created interpretive assets distinct from the contested statutory text. I refer most obviously to their discounting or rejecting legislative history.").

67. SCALIA, *supra* note 44, at 92.

68. See Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2201–02 (2017).

69. See *Blanchard v. Bergeron*, 489 U.S. 87, 100 (1989) (Scalia, J., concurring) (suggesting that statutes should be interpreted in a way that is "reasonable, consistent, and faithful to [the statute's] apparent purpose"); Manning, *supra* note 24, at 78, 84; Nelson, *supra* note 23, at 355.

70. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (reasoning that legislative history can permissibly be used to respond to arguments based on absurd results).

textualism.<sup>71</sup> He leveled persuasive arguments against intentionalism as a methodology and against legislative history as a tool of interpretation.<sup>72</sup> Yet those arguments, successful in making the case against intentionalism, did little to make the case *for* textualism and even less to explain how textualism squared with faithful agency.<sup>73</sup> So Justice Scalia's commitment to faithful agency fits uncomfortably with his commitment to a text-alone theory, which, in turn, fits uncomfortably with his rejection of legislative history, leaving a tension at the heart of the New Textualism.

### C. The Nontextualist Response

Justice Scalia's arguments, and the New Textualism more broadly, set the judiciary and the academy atwitter.<sup>74</sup> In due course, the two developed counterarguments to the New Textualists' critiques, both for intentionalist methodology and for legislative history.<sup>75</sup> Then, the nontextualists countered with a critique of their own, pressing on the core tension of the New Textualism.<sup>76</sup>

To begin, these nontextualists countered that text—not intent or purpose—is law, but that faithful agents ought to effect congressional intent or purpose *as cashed out in text*.<sup>77</sup> So legislative history, while no longer playing a starring role (as in *Overton Park*),<sup>78</sup> could play a bit part in clarifying the intent of Congress for a particular text.<sup>79</sup>

This reorientation defeated the textualist arguments against intent-as-law by placing text above intent and purpose.<sup>80</sup> Or, as Justice Kagan quipped,

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71. See generally Eskridge, *supra* note 12, at 685–86.

72. See *id.*

73. See Brudney, *supra* note 66, at 980 (“Rejecting congressional definitions in favor of dictionary-based ordinary meaning extends beyond minority views like Scalia’s.”).

74. See Eskridge, *supra* note 12, at 653. Early on, Justice Scalia’s focus took more to the principled arguments, eliciting responses on those grounds first. *Id.*

75. *Id.* at 667.

76. *Id.* at 668–69 (illustrating two nontextualists’ critiques).

77. See *supra* notes 13–14 for a discussion of the relation between intentionalism and purposivism and an explanation of how, for this Article’s exposition and critique, those differences do not matter. *Id.*

78. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

79. *Id.* at 412 n.29.

80. Cf. Siegel, *Inexorable Radicalization*, *supra* note 22, at 131 (arguing that the textualists’ prime directive that “the text of a statute is the law” will make it impossible for them to ever be satisfied by nontextualism’s accommodations).

“we’re all textualists now.”<sup>81</sup> However, nontextualists continued, they looked to text primarily in service of cashing out Congress’s intent.<sup>82</sup> So intent and purpose—and thus any legislative history that could inform the meaning of the text and the intent of its authors—still had a place in the interpretive endeavor even as the text took pride of place.<sup>83</sup>

This reorientation dispensed with the principled objections to intentionalism and legislative history because nontextualists could no longer be accused of placing legislative intent above legislative action and elevating to law what was not law.<sup>84</sup> The reorientation, by foregrounding congressional intent within the textual inquiry, could also maintain its claim to faithful agency.<sup>85</sup>

Continuing their counter, nontextualists replied to the textualists’ policy and practical arguments. On policy, they countered that interpretation works best when branches coordinate to achieve the aims of government.<sup>86</sup>

As for practicality, nontextualists delved into the interstices of the legislative process to discover which legislative history mattered, why it did, when it did, and how judges could go about applying it without stumbling into the parade of horrors that textualists had trotted out.<sup>87</sup>

In that spirit, Jane Schacter and Victoria Nourse interviewed sixteen

81. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (describing the success of Justice Scalia’s textualist push).

82. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (“Textualism has so succeeded in discrediting strong purposivism that it has led even [nontextualists] to give great weight to statutory text.”).

83. See Eskridge, *supra* note 12, at 672. Eskridge put forth this argument in his initial article describing the new textualism, and it has become a standard line for nontextualists. *Id.*; see also KATZMANN, *supra* note 23, at 35 (“I have found legislative history to be helpful. . . . It can aid in the search for meaning when a statute is silent or unclear about a contested issue.”).

84. See Barrett, *supra* note 68, at 2193–94 (discussing the rise of the “process-based” scholars, who argue that the disagreement between textualists and nontextualists is about which set of linguistic conventions should be used to determine what the words in a statute mean, not simply statutory meaning versus congressional intent).

85. See *id.* at 2199 (describing how “process-based theorists expressly contend that empirical evidence about how Congress works requires all interpreters committed to legislative supremacy and faithful agency, including textualists, to rethink their use of tools like . . . legislative history”).

86. See Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 420 (2007) (explaining that courts add a benefit when they apply interpretive tools instead of merely deferring to Congress, because Congress write prospectively and courts encounter the application of law to a specific case) [hereinafter Siegel, *Judicial Interpretation*].

87. See Eskridge, *supra* note 12, at 625 (stating that Scalia’s version of textualism, where legislative history should never be relevant, is unpersuasive, and that, instead, courts should follow clear guidelines when using legislative history in their statutory interpretations).

Senate Judiciary Committee staffers to shed light on the internal process of statutory drafting.<sup>88</sup> They asked the staffers a battery of questions about the process, ranging from their familiarity with the rules of judicial construction to the legislators' roles throughout the process.<sup>89</sup>

The responses revealed that Justice Scalia's critique of legislative history had not gained purchase among staffers, that staffers were familiar with (but not experts in) many interpretive tools, and that the drafting process itself was far less uniform and far less centered on legislators than imagined.<sup>90</sup> All of this suggested that the proper way to inquire into congressional will would be to drop the canons,<sup>91</sup> let go of the hostility to legislative history,<sup>92</sup> and focus more on the interstices of the drafting process that transforms congressional will into law.<sup>93</sup>

In a large-scale follow-up, Abbe Gluck and Lisa Schultz Bressman surveyed over one hundred staffers across multiple committees and both parties.<sup>94</sup> Their results tracked the Nourse and Schacter findings: sparse awareness and employment of canons;<sup>95</sup> an outright rejection of some;<sup>96</sup> support for legislative history;<sup>97</sup> and nuanced takes on the feedback tools that allow communication between Congress and the courts to succeed.<sup>98</sup> All in all, the study provided a roadmap for investigating legislative history from the inside (as the title promised) and hence provided a roadmap for discerning intent.<sup>99</sup> That

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88. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576–78 (2002).

89. *Id.* at 576.

90. *Id.* at 583.

91. *See id.* at 600–02.

92. *Id.* at 605–09 (detailing the various reasons the staffers gave as to why Justice Scalia's critique against legislative history had "little resonance" in the drafting process).

93. *Id.* at 621–22 (suggesting that giving an expanded role to the Legislative Counsel's office when bills are being drafted would increase congressional awareness of potential interpretive outcomes and would create a valuable framework for communication between the branches).

94. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 901–02 (2013).

95. *Id.* at 1016.

96. *Id.*

97. *Id.* at 964–66.

98. *Id.* at 943, 952.

99. *See id.* at 968 (discussing the findings that legislative history is more likely to be drafted by staffers who are accountable to elected members and have more subject-matter expertise than staffers who draft statutory text, therefore making legislative history a better source to discern congressional will).

roadmap countered the practical and policy arguments textualists put forth, like judicial ineptitude,<sup>100</sup> all the while showing that textualist methodology does not track the reality of how Congress legislates.<sup>101</sup>

More recently, Chief Judge Katzmann drew together these results, added his own knowledge as a political scientist, and made a case against Justice Scalia's textualism.<sup>102</sup> He adopted a purposivist approach and responded to Justice Scalia's critique on a few fronts, arguing that textualism has no feedback effect that disciplines Congress, that it does not constrain judges, and that its view of Congress is divorced from reality.<sup>103</sup> Thus, he counseled judges to seek congressional purpose based on a realistic understanding of the reliable resources available.<sup>104</sup>

This research offered nontextualists ammunition too. They could now train their arguments on New Textualism's core tension: It pretended to ground itself in faithful agency, but never cared for congressional will or the interpretive tools now proven to reveal congressional will.<sup>105</sup>

In brief, the nontextualists response to Justice Scalia had two parts.<sup>106</sup> The first recognized that intent is not law, accepting Justice Scalia's point.<sup>107</sup> From there, nontextualists adopted a methodology that carried out faithful agency by effecting intent as cashed out in text and consulting legislative history for only its informative value in that endeavor.<sup>108</sup> Gone are those who would

100. See *supra* Section II.B for a discussion on various practical concerns about whether judges should be allowed to consider legislative history.

101. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 725–26 (2014) (studying the structural, personnel, and process-related influences on the legislators during the drafting process, and concluding that the findings undermine textualism's assumption that the best evidence of the legislative bargain lies in the statute's text).

102. See generally KATZMANN, *supra* note 23.

103. *Id.* at 47–49.

104. *Id.* at 31–35 (advocating the purposive approach and stating that, if judges do not seek to discover congressional purpose in a statutory text, they will “interpret statutes unmoored from the reality of the legislative process and what the legislators were seeking to do”).

105. See Siegel, *Inexorable Radicalization*, *supra* note 22, at 124 (decrying textualism's objective to “follow the meaning of statutory text wherever it leads, without concerning themselves with whether that meaning matches the meaning intended by the enacting legislature or whether it serves the legislature's purpose”).

106. See Molot, *supra* note 82 (predicting that modern textualism will merge with purposivism); see also KATZMANN, *supra* note 23 (responding to textualism's arguments from a purposivist perspective).

107. See Molot, *supra* note 82, at 5 (stating that textualism's turn towards statutory interpretation was a natural “reaction to that which preceded it”).

108. See *id.* at 3 (stating that “even nonadherents today tend to forgo legislative history if the text,



follow *Overton Park* and place intent, and hence legislative history, above text.<sup>109</sup> In their stead, a host of nontextualist scholars showed how legislative history could reveal intent and how judges could—and should—use it.<sup>110</sup>

Second, nontextualists pressed on the core tension of New Textualism. They argued that looking for public meaning and shunning intent could not be squared with a commitment to effecting the will of Congress.<sup>111</sup> And they pressed, in particular, on the informative value of legislative history, suggesting that faithful agents ought to consider it as a tool to discern congressional will.<sup>112</sup>

#### D. The Textualist Replies

Textualist replies, both to the nontextualists' parries and their thrusts, followed two distinct tracks.<sup>113</sup> The mainstream recognized that the nontextualists had responded adequately to Justice Scalia's critique of intent.<sup>114</sup> These textualists recognized that a search for intent-as-cashed-out-in-text did not elevate to law what was not law.<sup>115</sup> And they recognized that, in such a framework, legislative history could be legitimate—not to control, but to inform the meaning of a text and the intent captured in it.<sup>116</sup>

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in context, otherwise is clear").

109. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971) ("The legislative history . . . is ambiguous . . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

110. See Gluck & Bressman, *supra* note 94, at 975 (reporting that staffers considered legislative history to be the most important interpretive resource apart from text).

111. See Siegel, *Inexorable Radicalization*, *supra* note 22, at 134 (criticizing textualism's formalist axiom that proclaims that courts must disregard intent or purpose, "even if courts could perfect discern congressional intent or purpose," if it clashed with the statutory text).

112. See Gluck & Bressman, *supra* note 94, at 988 (concluding that the findings regarding how staffers viewed legislative history could help provide "faithful-agent judges [who] need an account that explains their willingness to diverge from that practice").

113. See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1289 (2010) (noting that the nontextualists' critiques of early textualism "helped create an environment" for the emergence of "second-generation textualism").

114. See *id.* at 1298, 1314 (calling Farber and Frickey's "comprehensive treatment of the textualists' most intuitively appealing empirical claims about . . . the implausibility of a coherent 'legislative intent'" as one that "merit[ed] consideration") (noting that second-generation textualism is less skeptical of intent arguments as a conceptual matter).

115. See Manning, *supra* note 24, at 79 (noting that because textualists look for the "objectified intent," or "the intent that a reasonable [person] would gather from the text of the law," they are in a way similar with purposivists).

116. See Eskridge, *supra* note 12, at 669 ("[M]ost of the new textualists would consider legislative

Mainstream textualists thus did not contest the nontextualist reorientation from intent-as-law to intent-as-cashed-out-in-text-as-law.<sup>117</sup> Mainstream textualists agreed with nontextualists that faithful agents should effect Congress's will and that legislative history could inform that search.<sup>118</sup> They instead pressed the practical and policy arguments, which would reject legislative history despite any informative value it might add.<sup>119</sup>

As a result, today's mainstream scarcely argues that legislative history is, in principle, illegitimate.<sup>120</sup> But arguments abound over the practical and policy concerns of legislative history, with textualists contending that those concerns militate against legislative history.<sup>121</sup> Manning, for instance, stresses that text is a compromise and doing anything but focusing on text undoes the bargained-for legislative language.<sup>122</sup> Judge Easterbrook applies a law-and-economics lens, noting the practical and policy troubles of examining intent and purpose.<sup>123</sup>

Mainstream textualists also adduced these arguments to respond to the nontextualists' accusation that the New Textualism cannot be squared with faithful agency.<sup>124</sup> Faithful agency, the textualists replied, is best served by ignoring intent and legislative history because of the attendant policy concerns—but *not* because intent or legislative history are illegitimate.<sup>125</sup>

Indeed, mainstream textualists even conceded that the idea of

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history if the other aids still leave the statutory meaning truly unclear.”).

117. See Manning, *supra* note 24, at 87 (noting that although purposivism is characterized by the conviction that judges should interpret statutes in a way that carries out its reasonably apparent purpose, “purposivists start . . . their inquiry with the semantic meaning of the text”).

118. See *id.* at 108 (describing the difference between textualism and nontextualism's faithful agency belief as textualists “believe that the obligation of the faithful agent is to respect not the legislature in the abstract, but rather the specific outcomes that were able to clear the hurdles of a complex and arduous legislative process,” which legislative history can inform).

119. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 1 (1998) (“One important aspect of the perceived textualist ascendance is a decline in the Court's use of legislative history, an interpretive resource grounded in the more traditional ‘intentionalist’ approach to statutes.”).

120. See John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2403–12 (2017) (noting the conceptual support for legislative intent and then discussing the practical arguments against it) [hereinafter Manning, *Without the Pretense*].

121. *Id.*

122. *Id.* at 2430–31.

123. See Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 916–22 (2010).

124. See Manning, *Without the Pretense*, *supra* note 120, at 2429–30.

125. *Id.*

congressional intent undergirds their faithful agency, as it does for nontextualists.<sup>126</sup> Manning, for instance, writes that “textualists necessarily believe in some version of legislative intent.”<sup>127</sup> Saikrishna Prakash and Larry Alexander go so far as to deny the possibility of “intention-free textualism.”<sup>128</sup>

Because the mainstream acknowledges that intent undergirds faithful agency, some scholars portray the debates between textualists and nontextualists as minor.<sup>129</sup> After all, each camp espouses faithful agency as its grounding principle.<sup>130</sup> Each agrees that intent is a necessary premise of interpretation.<sup>131</sup> They part ways only on the practical and policy arguments for legislative history as an aid to faithfully effecting congressional will.<sup>132</sup> And often, they reach the same result.<sup>133</sup>

Yet the mainstream is not the only stream within textualism.<sup>134</sup> As an undercurrent, there is another stream of textualism that is rethinking faithful agency altogether and charting a new course.<sup>135</sup> That undercurrent recognizes the tension between espousing faithful agency and then ignoring the intent of the principal.<sup>136</sup> But unlike the mainstream, which tries to square the two, the undercurrent rejects faithful agency.<sup>137</sup>

The undercurrent, in other words, recognizes the incompatibility of faithful agency and New Textualism’s methodology of examining text for public

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126. Manning, *Legislative Intent*, *supra* note 23, at 427 (“As a matter of political theory, any conception of judging rooted in the related premises of legislative supremacy and the faithful agent theory is, quite simply, unintelligible without an underlying conception of legislative intent. As Joseph Raz has explained ‘[i]t makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.’”).

127. *Id.* at 424.

128. Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004).

129. See, e.g., Molot, *supra* note 82, at 2–4.

130. Manning, *Legislative Intent*, *supra* note 23, at 420–22.

131. See Nelson, *supra* note 23, at 366 (noting that textualists’ willingness to consult legislative history in some instances betrays a concern with reliability and not just constitutional commands); see also John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 694 (1999).

132. See Manning, *Legislative Intent*, *supra* note 23, at 431–34.

133. *Id.* at 420–22.

134. *Id.*

135. Barrett, *supra* note 68, at 2209 (reframing faithful agency for textualists as adopting the “perspective of the people” rather than the will of Congress as the guiding interpretive principle).

136. *Id.* at 2207–09.

137. *Id.*

meaning.<sup>138</sup> And it recognizes the incompatibility of faithful agency and the tools of interpretation that the New Textualism employs—or refuses to employ.<sup>139</sup> Many have highlighted tensions in textualist understandings of the plain meaning rule,<sup>140</sup> absurdity doctrine,<sup>141</sup> canons of construction,<sup>142</sup> and faithful agency itself.<sup>143</sup> Increasingly, these textualists speak not of “faithful agency” but of interpretation from the perspective of “the people” or “the governed,” or textualism of a “democratic” spirit.<sup>144</sup>

Because the label “faithful agent” and the arguments of Scalia, Easterbrook, and Manning remain dominant, this developing textualism has not cleanly broken from the mainstream. In the academy, it sometimes retains the label “faithful agency” but then redefines the term so as to eliminate congressional will.<sup>145</sup> Indeed, this New New Textualism is not fully developed, but

138. *Id.*

139. *Id.* at 2208; John David Ohlendorf, *Textualism and the Problem of Scrivener’s Error*, 64 ME. L. REV. 119, 123–26 (2011) (describing the divide between “intent skeptical” and “non-intent skeptical” textualists); see Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 813–27 (2018) (setting out an argument for corpus linguistics as the proper approach to textualism and describing the kind of meaning that textualists should look for); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541 (2017) (noting the tension for textualists in applying the plain meaning rule); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 116–17, 121 (2010) [hereinafter Barrett, *Substantive Cannons*]; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391–93 (2005) (arguing that applying the absurdity doctrine does not square with textualism’s conception of faithful agency) [hereinafter Manning, *The Absurdity Doctrine*]; cf. Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation*, 116 MICH. L. REV. 819, 829–31 (2018) (reviewing RICHARD A. POSNER, *THE FEDERAL JUDICIARY* (2017)) (defending textualism, without mentioning faithful agency, on the grounds that it approaches law from the perspective of the governed).

140. See Baude & Doerfler, *supra* note 139, at 541 (noting the tension for textualists in applying the plain meaning rule).

141. Manning, *The Absurdity Doctrine*, *supra* note 139, at 2391–93 (arguing that applying the absurdity doctrine does not square with textualism’s conception of faithful agency).

142. See Barrett, *Substantive Canons*, *supra* note 139, at 116–17, 121.

143. Textualists are not the only ones to recognize, and press, this tension. See Brudney, *supra* note 66, at 976, 995–96. For example, James Brudney, no fan of textualism, writes that “ordinary meaning analysis based on dictionaries and language canons cannot be reconciled with the faithful agent model,” a conclusion he reaches by examining the chasm between the lawmaking process and the tools of textualism. *Id.*; see also Gautam Bhatia, *The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia’s Jurisprudence*, 42 HASTINGS CONST. L.Q. 525, 533 (2015) (preferring pragmatic to semantic meaning and noting that Justice Scalia’s view logically leads to judges acts as agents not of Congress but of the people); Gluck & Bressman, *supra* note 94, at 950.

144. See Barrett, *supra* note 68, at 2194, 2209; Lee & Mouritsen, *supra* note 139, at 827–28; Thapar & Beaton, *supra* note 139, at 830 (“[T]extualism is a particularly egalitarian and democratic approach to the law.”).

145. See Barrett, *supra* note 68, at 2208.

developing.<sup>146</sup> Yet increasingly, it is this textualism that represents the tack of modern textualists and is the direction in which the New Textualism will evolve.<sup>147</sup>

That evolution matters because the sea change in grounding principles leads to a different view of what textualism does as a methodology.<sup>148</sup> And in turn that leads to differences in the tools of interpretation that textualists use—and the nuts and bolts of how they use those tools.<sup>149</sup>

### III. RELITIGATING LEGISLATIVE HISTORY

Here things stood for *Digital Realty*.<sup>150</sup> Justice Sotomayor, joined by Justice Breyer, authored a brief concurrence dedicated solely to defending the majority's use of a Committee Report.<sup>151</sup> She drew on Chief Judge Katzmann's book, as well as Gluck and Bressman's article, to argue that Committee Reports ought to be considered as reliable indicators of Congress's intent, and thus, as indicators of meaning.<sup>152</sup>

So the Sotomayor concurrence resurfaced many of the academic arguments that had gone for years without a hearing in the pages of the U.S. Reports.<sup>153</sup> In doing so, it voiced the modern nontextualist position.<sup>154</sup> Justice Sotomayor recognized that intent is not law but can inform legal understanding.<sup>155</sup> She then relied on the scholarship to show how legislative history could reliably be parsed and contended that faithful agents should so parse it to best discover the intent that is cashed out in text.<sup>156</sup>

In this spirit, the concurrence culminated with Justice Sotomayor's remark that legislative history can "aid" interpretation and "fortify" textual

146. *Id.* at 2211.

147. Barrett, *supra* note 68, at 2211; see John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEX. REV. L. & POL. 235, 237–39 (2017) (arguing that textualists and purposivists have alike slipped into an "interpretive pluralism" and apply purposive lines of reasoning outside of statutory interpretation and textualists lines inside statutory interpretation).

148. Thapar & Beaton, *supra* note 139, at 831–32.

149. *Id.*

150. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

151. *Id.* at 782–83 (Sotomayor, J., concurring).

152. *Id.* (Sotomayor, J., concurring).

153. See *id.* (Sotomayor, J., concurring).

154. See *id.* (Sotomayor, J., concurring).

155. Compare *id.* (Sotomayor, J., concurring), with *supra* Section I.C.

156. Compare *Digital Realty*, 138 S. Ct. at 782–83 (Sotomayor J., concurring), with *supra* Section I.C.

analysis.<sup>157</sup> She therefore concluded that legislative history is a worthwhile resource for a faithful agent's inquiry into congressional will.<sup>158</sup>

Justice Thomas, joined by Justices Alito and Gorsuch, countered in an equally curt concurrence.<sup>159</sup> He wrote that the "statutory definition 'resolves the question before us,'" and therefore, the Court need not go further.<sup>160</sup> He objected to going further, writing that "[e]ven assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'"<sup>161</sup>

By focusing on the illegitimacy of intent as a matter of principle, and the associated illegitimacy of legislative history, the Thomas concurrence tracked the shift in textualist thought.<sup>162</sup> It did not hammer the practical and policy arguments now commonplace in today's statutory interpretation debates.<sup>163</sup> Instead, it bore the hallmarks of the emergent New New Textualism and its rejection of faithful agency.<sup>164</sup>

#### IV. A NEW NEW TEXTUALISM

The Thomas concurrence thus joined the undercurrents within textualism and signaled a shift on the Court from Justice Scalia's faithful-agency textualism to a textualism grounded in democratic interpretation.<sup>165</sup> That broader shift is further suggested by Justice Alito's decision to join the concurrence, because he has looked to legislative history in the past when the New

157. *Digital Realty*, 138 S. Ct. at 767, 782–83 (Sotomayor, J., concurring).

158. *Id.* (Sotomayor, J., concurring).

159. *Id.* at 783 (Thomas, J., concurring).

160. *Id.* (Thomas, J., concurring).

161. *Id.* (Thomas, J., concurring). Thomas also appended a now-famous colloquy between Senators Dole and Armstrong about how few legislators read committee reports, but he did so only in a footnote to his comment on Congress's reading habits. See *id.* at 784 n.1 (Thomas, J., concurring) (citing *Hirschey v. FERC*, 777 F.2d 1, 7–8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring)).

162. *Id.* at 767, 783 (Thomas, J., concurring); see Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 691–92 (2018) ("Courts must reject legislative history 'at the very outset' when the statutory text is unambiguous."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006) (arguing that modern textualism requires the court "to treat the clear import of an enacted text as conclusive, even when the text fits poorly with its apparent" intent or policy).

163. *Digital Realty*, 138 S. Ct. at 767, 783 (Thomas, J., concurring) ("[W]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.").

164. *Id.*

165. *Id.*

Textualism's arguments reigned but now seems to have been persuaded by the New New Textualism's arguments.

This Part begins by examining Justice Alito's conversion and how it signals a change of course in textualism on the Court. It then describes the trajectory that the undercurrents of textualism follow, both in the academy and the judiciary. Finally, this Part sketches a defense of that New New Textualism, which, it shows, finds a comfortable home in the philosophy of language.

#### A. Justice Alito, Textualist

When Justice Alito joined the Court, he had no qualms about inquiring into legislative history. For instance, in *Zedner v. United States*, during his first term on the Court, Justice Alito relied on legislative history to bolster his interpretation of the Speedy Trial Act.<sup>166</sup> As late as 2009, in *United States v. Santos*, Justice Alito turned to both House and Senate Reports to interpret the word "proceeds" in a money-laundering statute.<sup>167</sup>

As Anita Krishnakumar showed, at least from 2006–2009, Justice Alito did not follow textualism in the mold of Justice Scalia, or anything like it.<sup>168</sup> Instead, Justice Alito drew on purpose in about one-third of his opinions, intent in about one-fourth of them, and legislative history in about one-sixth of them.<sup>169</sup> And as late as 2013, in *Adoptive Couple v. Baby Girl*, Justice Alito inquired into legislative history, though with the disclaimer: "if the legislative history of the [Act] is thought to be relevant."<sup>170</sup>

More recently, though, Justice Alito seems to have shied away from the stuff, although without the academy noticing.<sup>171</sup> This past term, in *Class v. United States*, he relied on the Advisory Committee Notes to the Federal Rules of Criminal Procedure, but only after explaining that the Notes were not at all

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166. 547 U.S. 489, 501–02 (2006). That reliance drew a characteristic Scalia concurrence, in which he objected to the use of legislative history—and doubly so for statutes that present no facial ambiguity. See *id.* at 509–11 (Scalia, J., concurring).

167. 553 U.S. 507, 533, 539–40 (2008) (Alito, J., dissenting).

168. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 224, 274–75 (2010).

169. *Id.* at 250 tbl.2.

170. 570 U.S. 637, 649 (2013).

171. Siegel, *supra* note 38, at 916 ("Justice Alito is not a textualist."); Niel S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. FORUM 164, 166–67, 169–73 (2016) (describing Justice Alito's methodological pluralism and role as traditionalist).

like legislative history.<sup>172</sup> Then, at the end of the term, he, alongside Justices Thomas and Gorsuch, refused to join the legislative history portion of Justice Sotomayor's opinion in *Lamar, Archer & Cofrin, LLP v. Appling*.<sup>173</sup> Ditto for *Marinello v. United States*.<sup>174</sup> And since *Adoptive Couple*, Justice Alito has not authored an opinion that drew, in any meaningful way, on legislative history.<sup>175</sup>

It is also particularly telling that Justice Alito joined the *Digital Realty* concurrence, which does nothing but butt heads with the Sotomayor concurrence about the legitimacy of legislative history. There is no disagreement on outcome, the rest of the reasoning, or anything else in the case.<sup>176</sup>

### B. Sketching a Textualism Without Intent

Justice Alito's shift, along with the reasoning of the Thomas concurrence, manifests the intellectual shift within textualism.<sup>177</sup> That shift moves away from the faithful-agency textualism of Justice Scalia, Judge Easterbrook, and Professors Manning, Prakash, and Alexander, toward a New New Textualism

172. 138 S. Ct. 798, 808 n.2 (2018). Many thanks to Monica Haymond for pointing this out to me.

173. 138 S. Ct. 1752, 1756, 1763–64 (2018).

174. See 138 S. Ct. 1101, 1115 n.2 (2018) (Thomas, J., concurring). He does not, however, seem to be persuaded to join Justices Thomas and Gorsuch in their originalist jurisprudence. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223, 1242 (2018).

175. See, e.g., Scott A. Moss, *Judges' Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Divergence that Undercuts the Widely Assumed Textualism-Ideology Correlation*, 88 U. COLO. L. REV. 1, 5, 7–8 (2017) (“[T]he past decade shows that Justice Alito has joined that Scalia/Thomas textualist camp, while Chief Justice Roberts definitely has not.”).

176. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring). For this reason, it seems that Justice Alito is not just adopting the “old textualism” or protean new textualism, which apply a “hard plain-meaning rule.” See Eskridge, *supra* note 12, at 656. *Digital Realty* would only require that much and no more; however, as the opinion finds the text unambiguous and a hard plain-meaning rule bars legislative history in that scenario, the duel of concurrences suggests something larger at stake and a reorientation of the jurisprudence. See generally *Digital Realty*, 138 S. Ct. at 767–84. Though if Justice Alito were merely adopting a hard plain-meaning rule, that would still represent a shift from *Zedner*, where he acknowledged that the text was clear and still inquired into the legislative history. See *Zedner v. United States*, 547 U.S. 489, 501 (2006).

177. See Siegel, *Inexorable Radicalization*, *supra* note 22, at 144–45, 169–70 (describing this shift as an “inexorable, expansionist force” in which textualism “[w]ork[s] [i]tself [p]ure,” but predicting that the pure, strict textual approach will give way to a more logical, fluid approach which may incorporate legislative history); cf. Lawrence M. Solan, *Opportunistic Textualism*, 158 U. PA. L. REV. 225, 227 (2009) (agreeing with Siegel on textualism's shift but arguing that it is “virtually impossible” to be a pure textualist and judges have therefore always bent their formalist textualism “in favor of what they believe to be a result more consistent with the legislative will”).



that replaces faithful agency with democratic interpretation.<sup>178</sup>

The Thomas concurrence, however, did not set forth a defense of New New Textualism or lay out the position of that textualism.<sup>179</sup> It only went so far as to reject intent on principle and side with the faithful-agency skeptics.<sup>180</sup>

The position of this New New Textualism, though, can be discerned, because this textualism is following a logical trajectory. That trajectory begins with the tension between public meaning and faithful agency, acknowledging the incompatibility of simultaneously pursuing congressional will and pursuing public meaning.<sup>181</sup> Then, rather than try to square the two, the New New Textualism rejects faithful agency and embraces public meaning. And it grounds that shift in the core premise of textualism—that the law is what the text means, and only that.

That trajectory leads to the following positions: first, faithful agency and public meaning are incompatible; second, public meaning is preferable to faithful agency; and third, legislative history must be rejected because it is not a tool for discovering public meaning.

This Section sketches a defense of that position, establishing the philosophical coherence of New New Textualism and showing how it emerges readily from the philosophy of language. It does so by showing how that philosophy severs intent from meaning. And then it applies that insight to law, severing faithful agency (intent) from public meaning (meaning) to yield the position of the New New Textualism.

### 1. Textualism as Philosophy of Language

The New New Textualism's position follows from ideas that the philosophy of language developed in the mid-twentieth century, namely that meaning

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178. See Brudney, *supra* note 66, at 980 (“It surely does not reflect faithful agency to maintain that congressionally enacted definitions should be subordinated to judicially constructed ordinary meaning. A faithful agent perspective is more likely to suggest that when the statutory definition includes one or more examples of an unconventional or uncommon sense of the word defined, that definitional sense should prevail as Congress’s will. Rejecting congressional definitions in favor of dictionary-based ordinary meaning extends beyond minority views like Scalia’s.”).

179. *Digital Realty*, 138 S. Ct. at 783–84 (Thomas, J., concurring).

180. *Id.* (Thomas, J., concurring).

181. Compare Barrett, *Substantive Canons*, *supra* note 139, at 110 (“[E]arly federal courts believed ‘the judicial Power’ to include a broad equitable authority to alter statutory text. Defending the principle of faithful agency, textualists have argued that early federal courts . . . ultimately abandoned, a claim to such power as their understanding of the constitutional structure sharpened.”), with *supra* notes 16–18 and accompanying text.

(in the sense of content<sup>182</sup>) turns on use.<sup>183</sup> Coupled with textualism's core premise that the law is what the text means, philosophy adds the premise that textual meaning is always determined by how the public uses—and, equivalently, understands—the words in the text.<sup>184</sup> To complete the syllogism: All law is textual meaning, and all textual meaning derives from public understanding. So law reduces to the public's understanding of the text, not intent, or purpose, or anything else.<sup>185</sup>

Philosophy's contribution to this syllogism traces back to philosophers like John Langshaw Austin and Ludwig Wittgenstein (already a mainstay of Judge Easterbrook's writings),<sup>186</sup> who revived interest in the philosophy of language after centuries of dormancy. Their main thrust, which upended that dormancy, was to prove that the way to understand language, and therefore the philosophical concepts captured by language,<sup>187</sup> is to look at how people use and understand words.<sup>188</sup>

In an example that highlighted that point, Wittgenstein imagined a child

182. See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 87–92 (1989). “Meaning” is itself ambiguous. See *id.* Much philosophy of language jumps off of Grice's work, which itself begins with an examination of the sense of meaning captured in “what did he mean by that.” See *id.* That sense of meaning inquires into the speaker's mind. See *id.* The sense of meaning here is that of “what does the word ‘umiak’ mean?” See *id.* That sense of meaning inquires into the content of the term, and meaning-as-use shows that the latter version and the former have nothing to do with one another: mental states do not bear on content. See *id.*

183. See Dan Walz-Chojnacki, “Can We Have a Word in Private?”: Wittgenstein on the Impossibility of Private Languages, 14 *MACALESTER J. PHIL.* 131, 135–37 (2005).

184. See *id.*

185. See *id.*

186. See, e.g., Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1122 (1998) (asserting that Wittgenstein teaches that “language depends on a community of readers rather than speakers' intent”); Easterbrook, *supra* note 48, at 536 n.5.

187. Philosophers of language split on this point. Austin was more robust, arguing that ordinary language was a better tool for understanding the philosophical than was past philosophical analysis. See, e.g., J.L. Austin, *A Plea for Excuses*, reprinted in *PHILOSOPHICAL PAPERS* 127–29 (J.O. Urmson & G.J. Warnock eds., 1961) (analyzing the concepts of “freedom” and “responsibility” by examining how ordinary language treats excuses); J.L. Austin, *Other Minds*, reprinted in *PHILOSOPHICAL PAPERS* 44–49 (J.O. Urmson & G.J. Warnock eds., 1961) (analyzing the questions of epistemology by examining how ordinary language uses the words “know” and “believe”). Wittgenstein does not go that far and only wishes to reframe certain of philosophy's questions as questions of language, so that philosophers cease to be “bewitched” by language. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 52 (P.M.S. Hacker & Joachim Schulte, eds., G.E.M. Anscombe et al. trans., 4th ed. 2009).

188. WITTGENSTEIN, *supra* note 188, at 40–44. Here, Wittgenstein pushed back on the Augustinian theory of language, which takes meaning to be depiction. *Id.* at 5. Note that even Augustine's view does not treat intent as relevant for determining meaning, and such views have developed only recently in light of the work of Grice. See GRICE, *supra* note 183.

unfamiliar with the word “toothache,” who instead coined his own term for that sensation.<sup>189</sup> Wittgenstein noted that this novel term, whatever it might be (say, “kozkolplak”) would be meaningless and unintelligible to others.<sup>190</sup> The child’s esoteric word choice, absent a preexisting public meaning, is merely “inarticulate sound.”<sup>191</sup>

By contrast, if the child were to say “pain,” everyone would understand, even though none feel the child’s pain.<sup>192</sup> The child, therefore, is not the master of his own words.<sup>193</sup> Instead, “much must be prepared in language for naming to make sense.”<sup>194</sup> And that preparation is the public understanding of words, which give the child’s use of “pain” intelligible content to others.<sup>195</sup>

As Wittgenstein put it, the use of a word “stands in need of a justification that everyone understands.”<sup>196</sup> That understanding, in turn, derives from the way that the rest of the community uses the word.<sup>197</sup> Public use determines public understanding, which, in turn, determines a word’s meaning.<sup>198</sup>

These examples show that a text’s meaning is necessarily a public phenomenon and untethered to the intent of a speaker. An invented word, or any word use, does not mean what the inventor intends it to mean.<sup>199</sup> Either the word means nothing at all (“kozkolplak” for “toothache,” which is inarticulate sound) or it collapses into a shared, public meaning (“toothache,” used by the child as commonly used), or it is a misuse of terms because everyone else uses the term differently (if by “toothache” the child wishes to describe a sandwich). But in no case does the speaker’s intent dictate, or even inform, the content of a word’s meaning.

In that same spirit, consider a series of hypotheticals that show directly that intent does not inform such meaning, and only public use does.

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189. See generally WITTGENSTEIN, *supra* note 188, at 98.

190. *Id.*

191. *Id.* at 98–99.

192. *Id.*

193. Walz-Chojnacki, *supra* note 184, at 136–38.

194. WITTGENSTEIN, *supra* note 188, at 98.

195. See *id.*

196. See *id.*

197. See *id.*

198. See *id.*

199. See generally GRICE, *supra* note 183, at 87–92. Contrary to Grice, who seeks to jump from meaning in the sense of intent (i.e. “what did he mean by that”) to meaning in the sense of content (i.e. “Umiak” is a kind of boat). See *id.*

1. Suppose Bishop Barbarosa decides that services on Sunday will take place at 11:50 A.M. He requests the altarboy to letter the church sign accordingly. Unfortunately for the bishop, the altarboy is semi-literate, and interchanges the “5” and the “0,” so the sign reads: “Sunday Services 11:05 A.M.”

Does the sign that reads “Sunday Services 11:05 A.M.” mean that Sunday services will take place at 11:50 A.M.? No. And that is true, even though both Bishop Barbarosa and the semiliterate altarboy *intended* that the sign mean Sunday services will take place at 11:50 A.M.

2. Suppose Bishop Barbarosa again determines that services will be held at 11:50 A.M. and again requests that the semiliterate altarboy letter the sign accordingly. This time, though, the altarboy mishears Bishop Barbarosa, mistaking “11:50” for “11:15.” And this time too, he misplaces a number, putting a “0” where the “1” should be, and so the sign again reads: “Sunday Services 11:05 A.M.”

Here, too, the sign means what it says, even though the Bishop and the altarboy each intended a different meaning.

3. Now take the normal case, where everything goes well. Bishop Barbarosa asks the semiliterate altarboy to letter the sign for “11:50 A.M.” and he does so. The sign reads: “Sunday Services 11:50 A.M.”

The sign, therefore, means what both the Bishop and the altarboy intended it to mean. But it does not mean that *because* they intended it to mean that, but rather because the reader of English, walking by that sign, would understand its meaning to be that Sunday services will take place at 11:50 A.M.

All the intent in the world will not make 11:05 A.M. mean 11:50 A.M.<sup>200</sup> No amount of plumbing the mind of the bishop or the altarboy can determine what the sign means. To determine the meaning, a reader must read not minds but words and must do so through the lens of the woman on the Clapham Street omnibus.<sup>201</sup>

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200. See *supra* note 186 and accompanying text.

201. See *Hall v. Brooklands Auto-Racing Club* [1933] 1 K.B. 205, 224 (using the “man on the Clapham omnibus” as the measure of a reasonable man for negligence); see also STACIE STRONG ET AL., *COMPLETE TORT LAW: TEXT, CASE, & MATERIALS* 67–68 (2d ed. 2011) (discussing the facts of

New New Textualism transfers this insight—that intent does not bear on meaning—to the class of words that are law.<sup>202</sup> That transfer severs congressional intent from public meaning and completes the syllogism: The law is what its words mean; the words’ meaning is their public understanding; and so law amounts to effecting the public understanding of the text’s words.

That syllogism, in turn, yields the position of the New New Textualism. First, that faithful agency and public meaning are incompatible. Second, that public meaning should be preferred. And third, that legislative history must be rejected because it captures intent, and therefore does not bear on meaning.

## 2. Possible Objections

Two possible objections might be lodged against this demonstration. One, from the textualist side, contends that meaning, even in the sense of content, presupposes intent.<sup>203</sup> Another, from the nontextualist side, contends that this demonstration proves no more than the plain meaning rule.<sup>204</sup> Both miss the mark.

On the textualist side, the hypotheticals highlight the flaw in intent-based textualisms like those of Manning, Prakash, and Alexander.<sup>205</sup> Those textualists are correct that laws presuppose intent,<sup>206</sup> just as books presuppose authors and fences presuppose fence makers.<sup>207</sup> But the intent of a fence maker to make a fence that keeps the cows in does not guarantee that the fence will, in fact, keep the cows in.<sup>208</sup> So, too, the intent of the bishop and the altarboy does not guarantee that the content of the sign will match their intent.

The same holds for laws. Laws are legally operative words, what J.L. Austin called “performative utterances.”<sup>209</sup> They create obligations through

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*Hall* and its impact). It seems only fair to have our measure of the reader for statutory interpretation be the woman riding next to this bloke. *Id.*; cf. William N. Eskridge, Jr., *Textualism: The Unknown Ideal*, 96 MICH. L. REV. 1509, 1511 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (referencing the reasonable man cases).

202. Harvard Law School, *supra* note 81.

203. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

204. See KATZMAN, *supra* note 23, at 47–49 (defining purposivism as against textualism).

205. See *supra* Section IV.B.2; see also Alexander & Prakash, *supra* note 128, at 977.

206. Alexander & Prakash, *supra* note 128, at 977.

207. See Manning, *supra* note 120; see also note 120 and accompanying text.

208. See, e.g., Eskridge, *supra* note 12, at 667 (noting that intentionalism collapsed in the 1980s).

209. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6, 98, 138, 145 (1962).

language,<sup>210</sup> just as saying “I promise” obligates one to keep a promise and passing a sales tax obligates people to pay a tax on sales.<sup>211</sup>

Like other performative utterances, though, the obligations a law in fact creates through its *content* need not be the obligations that lawmakers *intended* to create.<sup>212</sup> They may, in Austin’s word, “misfire.”<sup>213</sup> Congress’s language may be unsuccessful, much like a fencemaker’s construction may be unsuccessful and the altarboy’s lettering may be unsuccessful. Congress may intend to ban skateboards in the park, but a prohibition on “vehicles” in the park will not do the trick.<sup>214</sup> Put simply, what was intended by the lawmaker and what was done by the meaning of her words may differ,<sup>215</sup> and the meaning of her words cannot be determined by examining the intent.

The nontextualist objection, that these hypotheticals merely prove the plain meaning rule, fails too. In fact, the opposite is true. The *Barbarosa* hypotheticals undercut the plain meaning rule, at least as it is understood by nontextualists.

The plain meaning rule, in the eyes of nontextualists, tracks the following logic: When the meaning is plain, it is the best evidence of legislative will, and so plain meaning controls.<sup>216</sup> The hypotheticals prove the converse.

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210. *Id.* at 6.

211. *Id.*

212. *Id.* at 16.

213. *Id.*

214. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607 (1958).

215. *Id.* at 383.

216. See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (“[We] focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” (citation omitted)); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 n.4 (2013) (Sotomayor, J., dissenting) (“The best evidence of congressional intent, however, is the statutory text that Congress enacted.”); *Perry v. Commerce Loan Co.* 383 U.S. 392, 400 (1966) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”). Even Justice Scalia has adopted the line, writing that “[t]he only sure indication of what Congress intended is what Congress enacted.” *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 122 (2007) (Scalia, J., dissenting). As these cases show, this has been widely accepted as a truism; but the truism isn’t true. See *supra* notes 184–89. The best evidence of someone’s intent or purpose is usually *what she says her intent or purpose is*. See *supra* notes 184–89. In the three *Barbarosa* hypotheticals, *supra* Section IV.B.1, the Bishop’s intent is best revealed by what he asks the altarboy to do, not what the sign says. Often, that evidence of intent or purpose is unavailable, and so text will be the best available evidence for nontextualists. But when that evidence *is* available, intentionalists should, in principle, rely on that over and against text—contrary to the truism, and contrary to the nontextualists’ disavowal of pre-Scalia nontextualism, in which intent was treated as law. See discussion *supra* Section IV.B.1.

When meaning is plain, legislative intent does not matter because it does not inform meaning—not because the meaning of the words reflects the intent.<sup>217</sup> Nothing about the intent of the bishop and the altarboy informs the meaning of the sign. The sign means what it says in each hypothetical, regardless of their intent.

And what holds true for the plain cases should hold even more for the not-so-plain cases. It is a strange theory of interpretation that rejects intent in the face of plain meaning, on the reasoning that intent does not show meaning, but then embraces intent in the face of not-so-plain meaning, despite the very reasoning that intent does not show meaning.

### *C. Implications for Textualists and Nontextualists*

Philosophy of language thus severs intent from meaning.<sup>218</sup> It follows that faithful agency, which applies legislative intent, cannot be compatible with textual meaning. That severance bears implications for both textualists and nontextualists. For textualists, it suggests that the New New Textualism ought to replace today's textualism. For nontextualists, it suggests either that a commitment to faithful agency requires a return to pre-Scalia intentionalism or that a commitment to faithful agency requires a wholesale rethinking of nontextualist interpretation.

#### 1. Textualists

Because textualists believe that the law is what the words mean, the severance militates for rejecting both faithful agency and legislative history. This rejection yields two practical results for textualists: one on perspective and one on legislative history.

On perspective, under the New New Textualism, democratic interpretation replaces faithful agency. Thus, when New New Textualists interpret, they interpret from the perspective of a reader in the public, not Congress; the

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217. See *supra* Section IV.B.1. It should instead seek public meaning, discarding any tools of interpretation that do not tilt at such meaning, and it should do so regardless of how plain or muddled the text is. See generally Baude & Doerfler, *supra* note 139, at 549 (“[T]he relevance of information is not normally conditional. Either legislative history, statutory titles, or what have you tell us something about meaning or they do not.”). Seeking public meaning, regardless of “plainness” is also the answer to the question posed by Baude and Doerfler. See *id.* at 566 (Why [I] think nontextual evidence is relevant at some times but not at others . . . [?]”).

218. See *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring).

understanding of the person governed controls, rather than the intent of the governing.<sup>219</sup>

Put differently, the “misfire” goes to the governed.<sup>220</sup> So, when Congress intends one aim but the text’s meaning does not achieve that aim, the text’s meaning wins.<sup>221</sup> This result accords with a host of principles in American law, from the rule of lenity<sup>222</sup> to the presumption of innocence<sup>223</sup> to interpreting contracts against their drafters,<sup>224</sup> and it tracks the basic sentiment that the people who write the rules should not also have the arbiter of those rules take their side.<sup>225</sup>

This New New Textualism therefore jettisons tools of interpretation only insofar as they tilt at intent rather than public understanding.<sup>226</sup> While a full comparison of New Textualist and New New Textualist interpretation goes beyond the scope of this Article, that comparison would reveal nuances that affect which tools can and cannot be used, like the absurdity canon and substantive canons.<sup>227</sup>

As for the tool at the center of this Article, legislative history, the comparison is instructive. New Textualists frown on legislative history of all

219. See Barrett, *supra* note 68, at 2201–02 (answering a question that Justice Scalia left open about who the relevant interpreter is). This perspective does not require an abandonment of scrivener’s error, as scholar John Ohlendorf suggests. See Ohlendorf, *supra* note 139, at 142. Scrivener’s error can be squared with intent because readers understand the meaning of scriveners’ errors too and equate those errors with the correct meaning. *Id.*

220. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1091 (2017) (recognizing “misfires” as scenarios in which legislators may have “wanted to communicate something that a member of the public” cannot glean from “reading the code” and noting that this key debate turns on whose perspective controls); cf. AUSTIN, *supra* note 209, at 14–17, 25–30 (discussing ways in which words can fail to have the intended operative effect).

221. See Baude & Sachs, *supra* note 22, at 1091.

222. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (holding the rule of lenity does not apply where there is no “grievous ambiguity or uncertainty”).

223. See, e.g., *In re Winship*, 397 U.S. 358, 363 (1970) (discussing the proper interpretation of beyond a reasonable doubt based on textual meaning).

224. See *Contra Proferentem*, BLACK’S LAW DICTIONARY (10th ed. 2014).

225. See Philip Hamburger, *Gorsuch’s Collision Course With the Administrative State*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/opinion/gorsuchs-collision-course-with-the-administrative-state.html> (objecting to *Chevron* deference on these grounds).

226. See Manning, *supra* note 23, at 424 (“[T]he only meaning collective legislative intentions are those reflected in the *public meaning* of the final statutory text.”).

227. See also Barrett, *Substantive Canons*, *supra* note 139, at 116–17. Because substantive canons reflect policy preferences, instead of providing guides to public language (as semantic canons do), they do not fit into a New New Textualist’s toolkit. *Id.*



kinds and only countenance it to rebut absurdity challenges.<sup>228</sup> New New Textualism jettisons legislative history in almost all instances, including for absurdity challenges.<sup>229</sup> But if that legislative history features ordinary users of the English language (be they elected congressmen or unelected staffers) discussing what the words of the statute mean, that legislative history is not to be disregarded entirely.<sup>230</sup> So congressional markups, for example, may be a valid and valuable source of insight (whether or not there is an absurdity challenge), as the markups feature debates over how to write texts that craft the desired performative utterances.<sup>231</sup>

## 2. Nontextualists

The severance of intent and meaning also poses a few questions to the nontextualist. Foremost, by proving the incompatibility of faithful agency (intent) and public meaning (meaning), the severance poses to nontextualists the question of why they should prefer faithful agency to public meaning.

If public meaning is to be abandoned, the severance poses a follow-up question about why nontextualists should prefer text as a tool to legislative history as a tool, given that legislative history may capture the will of Congress better than text does. Conversely, if faithful agency is to be abandoned, the severance poses a follow-up question about why legislative history ought to be considered at all.<sup>232</sup>

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228. See *supra* note 70 and accompanying text.

229. Compare *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (reasoning that legislative history can permissibly be used to respond to arguments based on absurd results), with Manning, *supra* note 120, at 2391–93 (arguing that applying the absurdity doctrine does not square with textualism’s conception of faithful agency).

230. Cf. Gluck & Bressman, *supra* note 94, at 998 (noting that legislative history appears to be drafted by ordinary staffers who have more subject matter expertise than the professional staffers who often draft statutory text). Arguably, though, the perspective of those speakers would have no more weight than the opinion of the reader of those laws would. See *id.* Put differently, a slave’s understanding of the Fugitive Slave Act’s text has equal weight as the understanding of the Act’s authors. *Id.*

231. See *id.* at 987. Doing so would also encourage Congress to focus more on the wording of legislation and how readers would understand it. *Id.* For an example of what this might look like, see 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318–19 (Max Farrand ed. 1937) (discussing the nuances of wording for the Declare War Clause).

232. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring) (“Legislative history can be particularly helpful when a statute is ambiguous or deals with especially complex matters. But even when, as here, a statute’s meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text.”).

Proponents of legislative history, and nontextualists, might respond to these questions in a few ways. At bottom, though, each way requires rejecting either the proposition that the law is the meaning of the text or the proposition that the judges seek to faithfully effect Congress's will—or both.

For example, nontextualists could argue that intent really does control and that text, while not the best evidence of intent,<sup>233</sup> can suggest intent,<sup>234</sup> and thus text should be examined in the service of determining intent. This, in essence, would mark a return to the intentionalism of the mid-twentieth century, exemplified by *Overton Park*.<sup>235</sup>

Alternatively, nontextualists could adopt David Strauss' approach to constitutional law and replace both faithful agency and public meaning with common-law judging, in which judicial evolution controls, instead of text or intent.<sup>236</sup> Or nontextualists could join the New New Textualists. But the challenge posed in Justice Thomas' concurrence, and by the philosophy of language as a whole, cannot go unanswered.

## V. CONCLUSION

Beneath the surface of *Digital Realty* lies much commotion. The undercurrents of textualism, which would sweep away faithful agency as the basis of statutory interpretation, appear to be gathering force. They already appear to have won over Justice Alito. And they seem successful in pressing toward a New New Textualism, one that graduates from Justice Scalia's. This textualism instead embraces democratic interpretation, which demands a textualist methodology of a different sort, one yet more committed to the primacy of text and one which considers different tools of interpretation legitimate, thinks about them differently, and alters how textualists do textualism.

That textualism finds a firm foundation in the philosophy of language.

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233. See *supra* note 22.

234. There is an asymmetry here—text can provide evidence what a speaker intended (the sign suggests what Bishop Barbarosa intended to convey), but intent does not provide evidence of meaning (that intent does not suggest the meaning of the sign). To see this, imagine that staring at a fence one year after it was constructed. The survival of that fence suggests an intent to construct a fence that lasts one year. But the way to determine if a fence in fact lasts one year cannot be determined by what the intent of the maker was—to make that determination you need to look at the fence.

235. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (“The legislative history . . . is ambiguous . . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.”); see *supra* Section I.A.

236. See David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879, 884–91 (1996).

And that philosophy, in turn, poses questions to other textualists and nontextualists about their principles and methodologies of interpretation, and the place of legislative history within it.